

UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 04-5111

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

versus

NELSON ROSADO, a/k/a Day-Day,

Defendant - Appellant.

Appeal from the United States District Court for the District of Maryland, at Baltimore. Marvin J. Garbis, Senior District Judge. (CR-03-335-MJG)

Submitted: February 28, 2006

Decided: July 3, 2006

Before NIEMEYER, MICHAEL, and GREGORY, Circuit Judges.

Dismissed by unpublished per curiam opinion.

Harry D. McKnett, Columbia, Maryland, for Appellant. Rod J. Rosenstein, United States Attorney, Paul M. Tiao, Assistant United States Attorney, Baltimore, Maryland, for Appellee.

Unpublished opinions are not binding precedent in this circuit. See Local Rule 36(c).

PER CURIAM:

Nelson Rosado pled guilty to one count of conspiracy to distribute cocaine base. He was sentenced to a term of seventy-two months' imprisonment. Rosado appealed, and subsequently filed a motion to remand requesting that his case be returned to the district court for resentencing in accordance with United States v. Booker, 543 U.S. 220 (2005).

Rosado contends that the appellate waiver set forth in his plea agreement was modified by comments made by the district court during the plea colloquy and sentencing hearing. The United States' silence in the face of those comments, he asserts, operated to alter the plea agreement and permit him to appeal. We have thoroughly reviewed the record and conclude that this contention is without merit. Next, Rosado argues that the district court sentenced him in violation of Booker by treating the guidelines as mandatory. Our review discloses that any Sixth Amendment error arising from Rosado's sentence is harmless. See United States v. Rodriguez, 433 F.3d 411, 416 (4th Cir. 2006). Holding Rosado accountable for the fifty grams of cocaine base set forth in the indictment to which he pled guilty, the resulting guideline range would still be higher than the seventy-two month sentence imposed. Thus Rosado was not prejudiced by the alleged Booker error.

We accordingly grant the Government's motion to dismiss. We deny Rosado's motion to remand and dispense with oral argument

because the facts and legal contentions are adequately presented in the materials before the court and argument would not aid the decisional process.

DISMISSED